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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 44043
Plaintiff-Respondent,)	
)	Canyon Co. Case No.
vs.)	CR-2015-17844
)	
GEORGE ALBERT SHUCK, JR.,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of Facts And Course Of Proceedings	1
ISSUE	2
ARGUMENT	3
The District Court Correctly Concluded That The Arizona Statute Under Which Shuck Was Previously Convicted For Driving Under The Influence Is Substantially Conforming For Purposes Of The Idaho Felony Enhancement	3
A. Introduction	3
B. Standard Of Review	3
C. Comparison Of The Challenged Arizona DUI Statute With Idaho's DUI Statute Shows The Two Statutes Are "Substantially Conforming"	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

PAGE

<u>State v. Juarez</u> , 155 Idaho 449, 313 P.3d 777 (Ct. App. 2013).....	6
<u>State v. Koivu</u> , 152 Idaho 511, 272 P.3d 483 (2012).....	7
<u>State v. Moore</u> , 148 Idaho 887, 231 P.3d 532 (Ct. App. 2010)	3, 5, 6
<u>State v. Schmoll</u> , 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007).....	3, 5, 6

STATUTES

A.R.S. § 28-1381	4, 5
A.R.S. § 28-1382.....	4, 5
A.R.S. § 28-1383.....	2, 3, 4, 7
A.R.S. § 28-1385.....	4
I.C. § 18-8004.....	passim
I.C. § 18-8004C	5
I.C. § 18-8005.....	3, 5

STATEMENT OF THE CASE

Nature Of The Case

George Albert Shuck, Jr., appeals from the judgment of conviction entered upon his conditional guilty plea to felony driving under the influence. Shuck contends the district court erred in rejecting his argument that one of the Arizona statutes under which he was previously convicted for driving under the influence is not substantially conforming for purposes of the felony enhancement in Idaho.

Statement Of Facts And Course Of Proceedings

The state charged Shuck with felony driving under the influence (“DUI”). (R., pp.12-14, 20-23.) Shuck’s two prior convictions, which resulted in the felony enhancement, occurred in Arizona. (R., p.23.) Shuck filed a “Motion in Limine to Exclude Predicate DUI Prior,” asserting that one of his Arizona convictions did not qualify for use in the enhancement because the applicable statute did not “substantially conform to Idaho’s DUI statute.” (R., p.34.) More specifically, Shuck argued that the statute was not substantially conforming because it included an element that enhanced the DUI to a felony based on the fact that Shuck committed the offense while driving on a suspended license from a prior DUI. (R., pp.41-45.) The district court denied Shuck’s motion after which Shuck pled guilty, reserving his right to challenge the district court’s ruling. (R., pp.77-91, 94-101, 109-110.) The court imposed a unified ten-year sentence, with three years fixed, and retained jurisdiction. (R., pp.117-119.) Shuck timely appealed. (R., pp.112-113, 122-125.)

ISSUE

Shuck states the issue on appeal as:

Whether the district court erred in concluding A.R.S. § 28-1383 is substantially conforming to I.C. § 18-8004.

(Appellant's Brief, p.3.)

The state rephrases the issue on appeal as:

Given that Shuck is "mindful" that the law does not support his assertion that the district court erred in finding that the Arizona statute under which he was previously convicted of driving under the influence is substantially conforming for purposes of an enhancement in Idaho, and given that Shuck has not argued, much less established, that controlling precedent should be overruled, has Shuck failed to show that the district court erred?

ARGUMENT

The District Court Correctly Concluded That The Arizona Statute Under Which Shuck Was Previously Convicted For Driving Under The Influence Is Substantially Conforming For Purposes Of The Idaho Felony Enhancement

A. Introduction

The district court ruled that the DUI conviction Shuck challenged qualified as a substantially conforming conviction for purposes of enhancing Shuck's DUI charge in this case to a felony pursuant to I.C. §§ 18-8005(6) and (10). Shuck acknowledges on appeal that he is "mindful" that the law does not support any claim of error by the district court, but he "[n]evertheless . . . maintains that A.R.S. § 28-1383(A)(1) is not substantially conforming with I.C. § 18-8004 because the Arizona statute requires proof that the defendant's driver's license was suspended at the time he was driving under the influence, and has no counterpart in Idaho's statutory scheme." (Appellant's Brief, p.4.) Application of the correct legal standards supports the district court's determination that the applicable Arizona statutes are "substantially conforming."

B. Standard Of Review

"The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court." I.C. § 18-8005(10). The construction and application of a statute also presents a question of law, over which the appellate courts exercise free review. State v. Moore, 148 Idaho 887, 897, 231 P.3d 532, 542 (Ct. App. 2010); State v. Schmoll, 144 Idaho 800, 803, 172 P.3d 555, 558 (Ct. App. 2007).

C. Comparison Of The Challenged Arizona DUI Statute With Idaho's DUI Statute Shows The Two Statutes Are "Substantially Conforming"

Of the two prior Arizona convictions the state alleged to enhance Shuck's DUI to a felony, Shuck challenged the conviction entered on May 1, 2008. (See R., pp.23 (alleging aggravated DUI conviction in Arizona), 42-44 (discussing Arizona's aggravated DUI statute).) That conviction was the result of a charge of aggravated driving under the influence where the aggravating factor was that Shuck committed the DUI while driving with a license that was suspended due to a DUI conviction from 2007. (See R., pp.95-96.) The relevant Arizona statute provides, in relevant part, that a person is guilty of aggravated DUI if he commits a DUI pursuant to A.R.S. §§ 28-1381 or 28-1382 "while the person's driver license or privilege to drive is suspended, canceled, revoked or refused or while a restriction is placed on the person's driver license or privilege to drive as a result of violating section 28-1381 or 28-1382 or under section 28-1385." A.R.S. § 28-1383(A)(1). Section 28-1382, A.R.S., in turn provides, in pertinent part:

A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state if the person has an alcohol concentration as follows within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle:

1. 0.15 or more but less than 0.20.^[1]
2. 0.20 or more.

Idaho Code § 18-8005(10) specifically defines “a substantially conforming foreign criminal violation” for the purpose of I.C. § 18-8005(6) as follows:

For the purpose of subsections (4), (6) and (9) of [section 18-8005] and the provisions of section 18-8004C, Idaho Code, a substantially conforming foreign criminal violation exists when a person has pled guilty to or has been found guilty of a violation of any federal law or *law of another state*, or any valid county, city, or town ordinance of another state *substantially conforming to the provisions of section 18-8004, Idaho Code*. The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court.

I.C. § 18-8005(10) (emphasis added).

Pursuant to the plain language of this statute, a court determining whether a foreign DUI conviction qualifies as “a substantially conforming foreign criminal violation” must compare the provisions of the foreign law to which the defendant pled guilty or was found guilty of violating with the provisions of I.C. § 18-8004, which set forth the elements of DUI in Idaho. See also State v. Moore, 148 Idaho 887, 898, 231 P.3d 532, 543 (Ct. App. 2010); State v. Schmoll, 144 Idaho 800, 803, 172 P.3d 555, 558 (Ct. App. 2007). If the provisions of the foreign law

¹ The “Felony Indictment” filed in relation to Shuck’s May 1, 2008 judgment alleges, in Count II, that Shuck “drove a motor vehicle with a blood alcohol content of .15% or more while his license was suspended or revoked,” in violation of A.R.S. § 28-1382(A). (Exhibit 2, p.2.) Count I of the same indictment also alleges that Shuck drove under the influence on the same date, citing A.R.S. § 28-1381 (as opposed to A.R.S. § 28-1382), without any reference to Shuck’s blood alcohol content. (Exhibit 2, p.1.) Although not entirely clear, it appears that Shuck was charged with two counts for the same incident because the first alleged a general DUI, and the second count was for the purpose of alleging the DUI was committed “under the extreme influence.”

“substantially conform” to the provisions of I.C. § 18-8004 (*i.e.*, the elements of DUI in the foreign state substantially conform to the elements of DUI in Idaho), the foreign conviction is a “substantially conforming foreign criminal violation” as a matter of law.

The district court compared Arizona’s DUI statute to Idaho’s DUI statute and found “the only difference” between the two “is that the Arizona statute has a two-hour time limit and a requirement that the accused must have consumed the alcohol prior to driving.” (R., p.6.) The district court noted, however, that the Court of Appeals, in Moore, *supra*, rejected the argument that these differences preclude a finding that the statute was substantially conforming. (R., p.99.) Specifically, the Court in Moore concluded that, even though North Dakota’s DUI statute also included the requirement that the defendant have a particular blood alcohol concentration as measured by a test performed within two hours of driving, the statute still substantially conformed to Idaho’s DUI statute because both statutes “prohibit the same essential conduct-driving while under the influence of alcohol and frame their prohibitions using the same language, requiring substantially conforming elements to be met to sustain a violation.” Moore, 148 Idaho at 897-898, 231 P.3d at 542-543 (quoting Schmoll, 144 Idaho at 804, 172 P.3d at 559); *see also State v. Juarez*, 155 Idaho 449, 452, 313 P.3d 777, 780 (Ct. App. 2013) (also rejecting argument that Nevada statute and Idaho statute not substantially conforming based on two-hour requirement in Nevada statute).

Shuck does not contend that the district court erred in finding that the Arizona and Idaho statutes are substantially conforming as it relates to the two-hour time limit or the requirement of prior consumption. (See generally Appellant's Brief, p.4.) To the contrary, Shuck acknowledges that if the same essential conduct is prohibited – driving while under the influence – the statutes are substantially conforming. (Appellant's Brief, p.4.) Instead, Shuck argues, as he did below, that "A.R.S. § 28-1383(A)(1) is not substantially conforming with I.C. § 18-8004 because the Arizona statute requires proof that the defendant's driver's license was suspended at the time he was driving under the influence, and has no counterpart in Idaho's statutory scheme." (Appellant's Brief, p.4.) Shuck, however, also acknowledges that this difference is irrelevant to an analysis of whether the statutes are substantially conforming. (Appellant's Brief, p.4.) As correctly noted by the district court, the fact that Arizona enhances a DUI to an aggravated DUI if the DUI is committed while the defendant is driving on a suspended license as a result of a prior DUI does not change the fact that the underlying prohibited conduct – driving under the influence – is the same and, therefore, substantially conforming. (R., pp.99-100.)

In light of Shuck's concession that the law does not support his claim, and because Shuck has failed to assert, much less establish, that existing precedent should be overruled, he has failed to meet his burden of showing error. See State v. Koivu, 152 Idaho 511, 518, 272 P.3d 483, 490 (2012) (citations omitted) ("We will ordinarily not overrule one of our prior opinions unless it is shown to

have been manifestly wrong, or the holding in the case has proven over time to be unwise or unjust.”).

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon Shuck’s conviction for felony DUI.

DATED this 9th day of September, 2016.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of September, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General